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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Petitioners believe it will be useful to the Court if we address several points raised by respondent's brief. These include respondent's misleading account of recent legislative history, the assertion that the doctrine of *Jewell-LaSalle* is somehow contrary to the objectives of the Copyright and Communications Acts, the notion that *Jewell-LaSalle* should be read to apply only where the broadcaster is unlicensed, respondent's curious response to the reliance issue, and the suggestion that this Court should now entertain respondent's belated contention that the performance here was not "for profit."

A. Respondent Misstates Recent Legislative History

Petitioners' main brief set out at length the long and active history of legislative response to this Court's unanimous decision in *Buck* v. *Jewell-LaSalle Company*, 283 U.S. 191 (1931). There was a dual purpose: First, we wished to demonstrate that *Jewell-LaSalle* is not an anachronism, that both in this country and abroad there has universally been carefully considered acceptance of the rule that a restaurant owner or hotel keeper who disseminates broadcast music over loudspeakers to entertain customers and employees thereby "performs" such music for copyright purposes. Second, we wished to establish that there has been here the kind of legislative assent that has previously led this Court to adhere even to questionable precedent. See *Flood* v. *Kuhn*, 407 U.S. 258 (1972), and the other cases cited at page 29 of our main brief.*

* In this connection, we note that in *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), to decide whether perforated paper used in piano rolls were "copies" of musical compositions for copyright purposes, this Court carefully reviewed and followed the leading British cases and those of lower American courts, relying as well upon the fact that, knowing of these cases, the Congress had repeatedly omitted to overrule them by legislation, "an acquiescence in the judicial construction given to the copyright laws." 209 U.S. at 14.

The lower court American cases, the British precedents and legislative acquiescence in those decisions led the Court in *Apollo* to decide against the claims of copyright proprietors (which decision happened also to preserve the status quo in the industry). Concurring specially, Mr. Justice Holmes pointed out that although the result of the decision was "to give the copyright less scope than its rational significance", he did not feel justified in dissenting, "[i]n view of the facts and opinions in this country and abroad to which my brother Day has called attention." 209 U.S. at 18-19. As was so often the case, Mr. Justice Holmes' more generous position as to the scope of copyright eventually prevailed. See his landmark opinion for the Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), and the comparable opinion by Mr. Justice Brandeis for a unanimous Court in *Jewell-LaSalle*.

Respondent does not challenge petitioners' contention that *Jewell-LaSalle* has been regularly incorporated by Congress in bill after bill. He seeks, however, to blunt the thrust of this argument, and to support his own "policy" argument, by asserting that in 1961, as "the culmination of extensive studies" (Brief for Respondent, p. 21), the Register of Copyrights advised the Congress that, pursuant to a supposed "principle" of "clearance at the source," broadcasters should bear the burden of compensating copyright proprietors for broadcast music disseminated in hotels, restaurants and other public places. Respondent also alleged that the language of S. 1361, the comprehensive revision bill which passed the Senate in September of 1974, would exempt him from liability. Both contentions rest upon a misleading account of the legislative history.

1. Respondent's Misstatement of the Copyright Office's Position

In 1961, the Copyright Office did indeed propose to the Congress that, as a policy matter, broadcasters should be made to bear the entire burden of compensating copyright proprietors for "performances" of broadcast music in hotels, restaurants and other public places. But respondent failed to apprise this Court of the fact that the Copyright Office soon abandoned this position.

The 1961 report was not the "culmination" of extensive studies—it was only a tentative position paper based on prior studies whose sole purpose was "to furnish a tangible core around which opinions and conclusions could crystalize."* Based upon responses to this position paper,

* So the Copyright Office described its earlier Report in 1965. See Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, May 1965, page ix [hereinafter, the "Supplementary Report"].

the Copyright Office in 1963 published a preliminary draft of proposed legislation, still only "an experimental device for provoking discussion and suggestions." Supplementary Report, at page xi. In this draft, unmentioned by respondent, the Copyright Office adopted a position consistent with the well established practice following *Jewell-LaSalle*. After publication of the preliminary draft, discussion conferences were held in Washington with representatives of all interested government agencies (including the FCC), the Judiciary Committees of the Congress, and other public and private parties. At one of these conferences, Barbara Ringer (then speaking for the Copyright Office, and now Register of Copyrights) confessed that "clearance at the source" had never been relied upon as a governing principle, but only as an "analogy." She admitted that "there really was not very much support for the recommendation as presented in the [1961] Report . . . We came to realize that this whole problem is really a much more complicated one than the Report suggests."* She explained that while the Copyright Office continued to believe that retransmissions to a hotel's *private* rooms should be exempt, liability should continue to be imposed where the broadcast is communicated to a *public* room by a loudspeaker system.** No one in the group to whom she was speaking, including Robert D. Greenburg of the FCC and representatives of the broadcast and performing rights industries, disagreed. The Register's Supplementary Report of 1965 advanced the position, later reflected in S. 1361 and entirely consistent with ASCAP's well-known licensing

* Copyright Law Revision, Part 3, Preliminary Draft for Revised U. S. Copyright Law and Discussion and Comments on the Draft, September 1964, page 238.

** *Id.*, at 240-41.

practices, that reproduction of radio broadcasts by loudspeakers in public places constitute "performances" with resulting liability, but that the use of only an "ordinary" radio set like those commonly sold for "private home use" should be exempted as a policy matter. Supplementary Report, at xix, 44. None of this found its way into respondent's brief.

2. Respondent's Misstatements Regarding S. 1361

Respondent's account of his alleged exemption under S. 1361 is equally misleading. At page 26 of his brief, respondent alleges that, under S. 1361, he would not be "an infringer on the facts of this case" because he did not charge an admission fee and the broadcasts were not "further transmitted to the public." Yet as S. 1361 was drafted, the exemption where no admission fee is charged, or where no further transmission to the public (*i.e.*, by means of loudspeakers) takes place, applies only to those who use a "single receiving apparatus of a kind commonly used in private homes." But one, like respondent, who uses receiving apparatus other than the single set commonly used in private homes is liable for infringement whether or not he charges admission or further transmits. Indeed, under S. 1361, respondent's acts are clearly "performances" as the term is defined by that bill. This is made abundantly clear by the report of the Senate Judiciary Committee.*

* Sen. Rep. No. 93-983, 93d Cong., 2d Sess. 113 (1974):

"Under the definitions of 'perform,' 'display,' 'publicly,' and 'transmit' in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broad-

(footnote continued on next page)

Respondent, with his five loudspeakers, simply does not fit within the bill's exception.

The Senate report makes clear that the purpose of the statutory language was to codify the rule of *Jewell-LaSalle*, the known licensing practices of ASCAP, and the position of the Copyright Office since at least 1965. That rule imposes liability upon respondent, who deployed five loudspeakers in various rooms of his restaurant to entertain his customers and employees.

B. *Jewell-LaSalle* Carries Out the Objectives of the Copyright Act of 1909 and the Communications Act.

Respondent advances an ingenious but erroneous argument that *Jewell-LaSalle* generates a second or windfall payment to the copyright proprietor, and that to the extent restaurant owners and hotel keepers are made liable for such a second payment, they will opt to turn off their radios, thereby denying to the listening public the benefits of copyrighted music and wide access to radio communications.

The position is fallacious. First, it perverts the Copyright Office's alleged "principle" of "clearance at the source." In 1961, the Copyright Office did seem to suggest such a "principle" and it proposed that only broadcasters

casting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subcribers; and *any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.*" (Emphasis added.)

should be liable for performances of broadcast music in restaurants, hotels and other public places. The retraction of that "principle" by the Copyright Office has been described above. But even that "principle" does not lead to respondent's conclusion. "Clearance at the source" is logically consistent with *Jewell-LaSalle*, for it recognizes that a restaurant owner or hotel keeper does "perform" when he disseminates broadcast music over loudspeakers. It merely transfers the burden of enforcement and collection to a more centralized source, the broadcaster. The idea was, after all, known to and considered by this Court in *Jewell-LaSalle;* Mr. Justice Brandeis observed that the Seventy-First Congress had rejected just such a mode for enforcing performance rights. 283 U.S. at 199 and n.6.

A second fallacy resides in the suggestion that the Copyright Act of 1909 prefers public access to copyrighted works even at the expense of their creators. The cases* cited by respondent do not support that proposition.**

The fact is that the Copyright Act of 1909, construed by this Court in *Jewell-LaSalle*, reserves exclusively to the copyright proprietor certain rights, including the right to

* *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948); *Mazer* v. *Stein*, 347 U.S. 201 (1954).

** *Paramount*, an antitrust case, held that while reward to authors served to benefit the public by inducing release to the public of the products of creative genius, that public purpose was thwarted by the abuse of antitrust law that had taken place. 334 U.S. at 158. *Mazer* clearly supports the basic philosophy underlying our copyright law—that the public is served when creators are paid for use of their works. The Court observed that: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." 347 U.S. at 219.

perform publicly for profit. If particular conduct constitutes a public performance for profit, the performer requires the consent of the copyright proprietor. So the Act states. This Court in *Jewell-LaSalle* held that public dissemination of broadcast music at the point of reception is a "performance." It reached that conclusion after considering the purposes and objectives of the Copyright Act. As our main brief demonstrated, that conclusion accords with the consensus reached around the world and reflected in all recent legislative proposals.

Moreover, the "windfall" concept is itself without foundation. As the record shows, the licenses negotiated with radio broadcasters have for many years expressly taken into account the fact that *Jewell-LaSalle* created an additional source of license fees. Radio broadcasters thus do not pay for performances occurring at commercial establishments—those performances are paid for only once, by the operators of those establishments.

The suggestion that *Jewell-LaSalle* is inconsistent with the Communications Act because it will cause operators of commercial establishments to turn off their radios and thus deprive the public of dissemination of broadcasts, is without foundation. If this Court were being asked, *as a matter of first impression,* to rule that commercial establishments like respondent's must secure licenses from copyright owners, it might conceivably speculate as to the effect such a rule would have on the frequency with which radios were used in public places. But it is not petitioners who advocate a new rule. We urge only that this Court adhere to a rule already over 40 years old, and under which many commercial establishments choose to use radio broadcasts over

loudspeakers and obtain appropriate licenses. Adherence to the status quo cannot conceivably shut off their radios.

Moreover, the claim that adherence to *Jewell-LaSalle* will create radio silence is not credible on this record. Respondent himself testified that the license fee in question, $5 a month, was only "a penny ante thing." Appendix, p. 61A. He did not testify that he had been harassed by multiple claimants for license fees, or that he would remove his radio and multiple speaker system if he, or his sponsors, lost this case. On the contrary, he swore that if *Jewell-LaSalle* were uphheld, "I will pay." *Ibid.*

C. There Is No Basis for Confining *Jewell-LaSalle* to Unlicensed Broadcasts.

Respondent contends that this Court should confine *Jewell-LaSalle* exclusively to situations where the broadcaster is unlicensed and would not itself provide a source of compensation to the copyright proprietors. Our main brief notes that nothing in the opinion or rationale of *Jewell-LaSalle* supports such a narrow construction, and that since Judge Wolsey's decision in *Society of European S.A.A.C.* v. *New York Hotel Statler Company,* 19 F.Supp. 1 (S.D.N.Y. 1937), the rule has been uniformly applied without regard to whether the broadcaster was licensed.

It is also noteworthy that in the extensive discussions conducted by the Copyright Office between 1961 and 1965, not one of the participants—neither the Copyright Office, government agency spokesmen, Judiciary Committee representatives, broadcasters, nor anyone else—suggested that any significance be accorded to whether a particular broad-

cast was licensed. And there is no trace of any such distinction in the legislative history of the proposals placed before the Congress.

D. Respondent Seeks to Evade the Reliance Issue by Misstating Muzak's Position.

In addition to contending that the substantial revenues directly jeopardized by the decision below are unimportant, respondent seeks to minimize the impact of overturning *Jewell-LaSalle* by misstating the position of the background music operators. Respondent asserts that the overruling of *Jewell-LaSalle* would not affect ASCAP'S revenues from background music operators because they will continue to need licenses and to pay royalties. Respondent's brief at page 28. But the threat to the revenues derived from background music operators does not arise from concern that they would escape liability. The argument advanced before the trial court by counsel for Muzak and its affiliates (the same counsel who have undertaken representation of respondent in this Court) is that the availability of free broadcast music would diminish the competitive position of the background music operators, force them to lower their own charges, and cause them to seek reduction in the fees they pay to ASCAP. Surely counsel for respondent have not forgotten the arguments they advanced as counsel for Muzak both below and in the pending proceeding for determination of reasonable license fees in the Southern District of New York.

E. This Court Should Not Now Consider the "Not for Profit" Argument Belatedly Advanced by Respondent.

Respondent belatedly suggests, at pages 13-15 of his brief, that this Court should rule that even if his were a "performance," it was "not for profit." His theory is that he sells hamburgers, not music. To adopt the suggestion would overturn much of modern copyright law, for no court and no legislature has imposed, as a condition of copyright liability, that music be sold as such.* The establishments in such cases as *Jewell-LaSalle* and *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) and their numerous progeny sold meals or lodgings and meals, not music. As Mr. Justice Holmes wrote in *Herbert*, 242 U.S. at 594-95:

> "If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers

* Although the imposition of an admission charge may transmute an otherwise exempt act, such as a jukebox performance, into an infringing act. 17 U.S.C. §1(e), last paragraph.

of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

In any event, the issue is not properly before this Court. It was not pressed below. It was not raised in respondent's brief in opposition to the petition for certiorari. And no cross-petition was filed to bring the issue before the court. To hold now that there is no infringement except where a performer sells music as such, and not where he simply performs such music to please customers and employees, would vastly widen the scope of the decision below, wreaking havoc with the revenues upon which authors, composers and publishers of musical works depend. In these circumstances it is the practice of this Court not to entertain such a belatedly raised issue. See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970), and cases there cited; Stern & Gressman, *Supreme Court Practice* 314-15 (4th ed. 1969).

Conclusion

For over 40 years the Nation's authors, composers and music publishers have entered into business arrangements with broadcasters and commercial establishments in reliance upon this Court's unanimous decision in *Jewell-LaSalle*. The line drawn by the Court in that case has won the support of courts and legislatures throughout the world, and it is reflected in current revision bills as well as those passed by the Senate in 1974 and the House of Representatives in 1967. The monies involved are "penny ante" from

the perspective of licensees like Aiken, but they are important in the aggregate to those who make our music. Relationships developed over 40 years between the creators of music and their public should not be disrupted on the basis of ill-conceived distinctions, unsound "policy" arguments, or misleading descriptions of the history of congressional action.

Respectfully submitted,

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